

Prisoners and Detainees in War

by Sibylle Scheipers

The article traces the evolution of the treatment of prisoners of war and the emergence of the modern, legally codified prisoners regime. It argues that the French Revolutionary and Napoleonic Wars were a turning point in the history of prisoners of war. With the nationalization of war long-established practices such as the release of prisoners on parole, the exchange of prisoners and the pressing of prisoners into the captor's armed forces were no longer politically feasible. The creation of the legally codified prisoners regime that started in the nineteenth century was a reaction to this breakdown of the traditional rules and customs.

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Introduction

Prisoners and detainees have always been a central aspect of war. Sometimes they even constituted the main motive for going to war. Ancient Rome, for instance, conducted several military campaigns with the main purpose of taking prisoners in the conquered territories that could then be enslaved.¹ More recently, the 2006 Lebanon war between Israel and Hezbollah arguably started as a conflict over captured or abducted fighters from both sides. Throughout the history of war, the treatment of prisoners and detainees often was a litmus test for the efficiency of rules and constraints on warfare.

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However, despite the continued relevance of prisoners in the history of war, their status and their treatment underwent major changes over time. The most important transformation occurred as a result of the nationalisation of war and the introduction of conscription in Europe after the French Revolution (→ [Media Link #ac](#)). Before the French Revolution captivity rarely extended over long periods of time: prisoners were executed, enslaved, released or enlisted into the captor's armed forces. With the nationalisation of war, the release or exchange of prisoners became largely unacceptable for political reasons. Hence, prisoners had to be detained for longer periods. As a result the conditions in which prisoners were held became an important political aspect of war, both in the interactions between opponents and in the context of propaganda efforts aimed at the home front or at international public opinion. At the same time – and this was partly a result of the politicisation of the issue of prisoners – the prisoner of war regime was legally codified in the second half of the 19th century and the first half of the 20th century. Its main objective was the protection of what states, which were the main drivers behind the prisoner of war regime, saw as "normal" and "legitimate". Hence, the law protected fighters, meaning members of the states' regular armed forces, whereas irregular fighters, such as guerrilla forces, insurgents and certain types of militias and private military forces, were largely excluded from these protections. The current debates and difficulties regarding the status and treatment of detainees in the so-called "war on terror" are a result of this exclusionary approach.

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This article discusses the historical trajectory of prisoners in war in three steps. The first section provides an overview of the treatment of prisoners before 1789. Section two explains how the French Revolution and the nationalisation of

war became a turning point in the history of prisoners in war. Section three traces the dual – and sometimes paradoxical process – of the increasing politicisation and legalisation of prisoners and detainees throughout the 19th and the 20th century. The article ends with some reflections on the question of whether the emergence of the modern prisoner of war regime was a specifically European development, subject to the particularities of European political and military history or culture. It concludes that this was not the case: on the contrary, the modern prisoner of war regime was strongly influenced by armed conflicts between Europe and the non-European realm, both at Europe's peripheries and in the colonies.

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Prisoners in War Before the French Revolution

For a long time in the history of war, captivity was merely a transitory period between the moment of surrender or capture and the prisoner's final fate: execution, enslavement, release or impressment into the captor's armed forces.² Wars in archaic and early classical Greece were constrained by a set of cultural rules that also regulated the treatment of prisoners who had to be offered for ransom to the opponent after the battle.³ However, it is difficult to say to what extent this rule was observed. Enslavement was a common alternative fate of prisoners.⁴ Massacres of prisoners did happen, in particular when they suited the political purposes of the victorious party.⁵ Ancient Roman warfare offered a similar picture, although the significance of enslavement was possibly greater. Often the inhabitants of whole towns and settlements were captured and enslaved.⁶ Mass enslavement was the result of a convergence of strategic and economic objectives. Strategically, it facilitated enforcing claims to conquered territory. Economically, enslavement was a source of additional income for the armed forces, in particular for the ordinary soldier.⁷ Mass enslavement made no distinction between combatants and civilians.

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War in medieval Europe was characterised by an evolving quasi-legal code of conduct restraining violence in warfare. This development was tied to the emergence of a warrior elite. Ransoming and executing prisoners continued to be common practices, whereas religious norms prohibiting the enslavement of Christian adversaries had emerged. Ordinary soldiers had largely lost their economic value, since ransom could only be expected for members of the nobility.⁸ For common men fighting in war, chances of surviving capture were low: "Armed peasants and townsmen ... could be massacred at will."⁹ Inhabitants of a besieged town refusing to surrender would often meet the same fate if the besieger succeeded.¹⁰ Apart from war fought within the constraints of the chivalric code of conduct (*bellum hostile*) and siege warfare,¹¹ however, there was a third category of war in the Middle Ages called *bellum Romanum* or *guerre mortelle*, which covered first and foremost (though not exclusively) armed conflicts between Christians and non-Christians, such as the Crusades. While *bellum Romanum* is often depicted as the lawless and unrestrained antithesis of the rule-bound *bellum hostile* supposedly resembling a fair and honourable contest among equals, such dichotomies should be treated with caution. Although massacres, torture and enslavement of prisoners were common practices, there were also examples of restraint and even generosity towards captured opponents.¹² Moreover, the treatment of non-Christian prisoners in the crusades bore many similarities to the treatment of peasants and townsmen in *bellum hostile*, except for enslavement.

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The end of the Middle Ages saw the decline of the warrior elite and, by extension, a decrease in the economic value of noble prisoners. Whilst in medieval wars ransoming was confined to the nobility, ordinary soldiers largely belonging to mercenary armies were now integrated into the ransoming system.¹³ The role and the fate of prisoners in war in early modern Europe slowly changed. The 16th and 17th centuries mark the beginning of a development that led to greater restraint in warfare and to increased efforts to enforce the laws of war.¹⁴ The gradual emergence of a state system (→ Media Link #ad) in Europe, in which the armed forces became a regulated part of the state apparatus, and the deconfessionalisation of war created the conditions for a transition towards greater restraint, although its trajectory was non-linear and characterised by numerous setbacks. This transitory period saw a variety of practices including execution, exchange, imprisonment, enslavement, release and impressment into the captor's forces. The practice of pressing soldiers was often attractive to both captors and captives, since it provided the former with additional manpower and the latter with food and shelter. However, whilst early modern European armies consisted largely of mercenaries, they were not necessarily indifferent as to what side they fought on. Therefore, impressment often substantially increased the chances of desertion.¹⁵

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The prevalence of siege warfare in the 16th and 17th centuries also meant that massacres were a widespread fate of prisoners.¹⁶ Yet from the beginning of the 17th century exchanging prisoners with the opponent slowly became a common practice that considerably enhanced the captives' chances of survival.¹⁷ The system of prisoner exchange through bilaterally negotiated cartels continued throughout the 17th and 18th centuries. Prisoner exchange was a rational solution, since soldiers held captive were of no use to either side. Prisoners were either exchanged man-for-man or for ransom. Considerable efforts were made to specify "exchange rates" for different military ranks accurately.¹⁸ An alternative to exchange was release on parole. Officers were allowed to return to their home country or to reside on their own in certain designated "parole towns" on condition that they gave their word of honour to refrain from returning to the on-going conflict.¹⁹ Ordinary soldiers were more likely to be induced to switch sides and join the adversary's armed forces if exchanging them was not possible.

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The Turning Point: The French Revolution and the Nationalisation of War

The nationalisation of war that started in 1793 with the levée en masse (→ Media Link #af) in France was a turning point in the history of prisoners in war.²⁰ It undermined or even eliminated the three core practices that had been the pivot of the pre-revolutionary prisoner regime in Europe: exchange cartels, release on parole and impressment into the captor's armed forces. Regarding exchange cartels, policy-makers in Paris found it unacceptable to exchange captured soldiers for money. On 19 September 1792 the French National Convent passed a decree stipulating that soldiers could only be exchanged man-for-man and officer-for-officer, but not for money.²¹ This decree reflected the fact that the perception of the soldier had shifted from being a "neutral" resource under the *ancien régime* to being regarded as a member of one's own polity. Thus the value of the national soldier could no longer be expressed in monetary terms. The practical problem with this shift was that during the French Revolutionary and Napoleonic Wars (→ Media Link #ag) there were many more French soldiers in British or Spanish captivity than vice versa. This forced the parties to the conflict to negotiate "unequal" exchange rates. The unofficial exchange rate between Britain and France in the 1790s was three Frenchmen for one British soldier, but all attempts at formalising this arrangement failed.

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Release on parole was another practice that fell victim to the Jacobin phase of the French Revolution. On 22 June 1793 the French National Convent passed a decree rejecting release on parole for officers. French officers were encouraged to break their word of honour and to return to the fighting upon their release. This rejection was based on two revolutionary principles: first, the perceived need to muster all available military resources, and secondly, the fact that many Jacobins "were deeply suspicious of 'honour', viewing it as individualistic, aristocratic and threatening to republican virtue".²² Most officers felt bound by their word of honour, but a substantial number violated their parole duties. This was sufficient to convince France's enemies, in particular Britain, that the French were actively undermining the prisoner regime. This sense of mistrust was a vital aspect in the final collapse of the *ancien régime* practice.

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Finally, the common practice of inducing soldiers to swap sides and join the captor's armed forces was also prohibited by a National Convent decree of 25 May 1793.²³ As with the French view on exchange cartels, the idea was that soldiers who were fighting for "their" nation and its cause ceased to be mere neutral "manpower" that could be substituted by someone with similar qualifications. Arguably, Napoleon Bonaparte (1769–1821) (→ Media Link #ah) later replaced impressment with the absorption of large enemy armies into his forces, either by introducing conscription in areas over which he had assumed direct control or by forcing satellite states to raise armies for his wars.²⁴

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Although some of the more extreme measures announced by the French National Convent, such as the 1794 "no quarter" policy towards British and Hessian soldiers, were never implemented on the battlefield, the experience of the French Revolutionary and Napoleonic Wars changed the European rules and customs of war regarding prisoners for good.²⁵ Despite the fact that policy-makers and commanders tried to return to the old system of exchange cartels and release on parole in the period of restoration in Europe after 1815, the practice of holding prisoners for the duration of the conflict became the new reality.

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The French Revolutionary and Napoleonic Wars precipitated another major transformation in the prisoner of war regime: the exclusion of irregular fighters from legal protections. Whilst the erosion of the *ancien régime* practices was mainly driven by policy-makers, the military had a large impact on this latter shift in detention practices. It was linked to a transformation of the military itself, in particular to the introduction of conscription. In spite of the fact that conscription brought large numbers of "military amateurs" into arms in the short run, and in spite of the fact that the Jacobin phase of the French Revolution aimed to dismantle many of the established military structures and traditions, its long-term effect was an increasing professionalisation of the French, and later also the wider European, armed forces.²⁶

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Although discipline, in particular off the battlefield, often remained a mere aspiration for the newly formed conscript armies, it quickly developed into a discursive tool designed to distinguish between the "legitimate" armed forces of the modern nation state and the "illegitimate" irregular fighters that the French Revolutionary and Napoleonic armies encountered both within France, such as the Chouannerie in western France and the royalist uprising in the Vendée, and across Europe, most famously during the Peninsular War (1808–1814).²⁷

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With the emergence of the modern nation state and its armed forces, the conviction evolved that irregular fighters, denounced as "brigands", were not *iustus hostes*, but enemies on a different moral footing.²⁸ As such they were not deemed to profit from the protections granted to captured or surrendered regular fighters, and were treated worse than their regular counterparts when they had fallen into the hands of the French armed forces. Although the regular armed forces' actual treatment of irregular fighters lacked consistency and often depended on individual commanders and on the tactical situation, the emerging moral and political discourse on irregulars paved the way for their eventual exclusion from the legally codified prisoners regime that began to emerge in the second half of the 19th century.

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Legal Codification of the Prisoner of War Regime, 1863–1977

If it was largely understood that the old prisoner regime was about to be eroded at the beginning of the 19th century, the wars that were to follow, in particular the American Civil War (1861–1865) and the Franco-Prussian War (1870–1871) had a huge influence on the creation of the new regime. The issue of prisoners in the American Civil War was complicated by the difficult legal situation of the conflict. Initially, the Union did not recognise the Confederacy as a belligerent party and referred to the conflict as "the rebellion" rather than the "civil war".²⁹ So theoretically, all Southern fighters could have been treated as traitors and punished by death upon capture. However, this did not happen. Instead, in July 1861 Union General George McClellan (1826–1885) agreed with representatives of the Confederacy to treat Confederate prisoners as prisoners of war and vice versa.³⁰ The agreement also envisaged prisoner exchanges between the Union and the Confederacy. It only applied to regular Confederate troops though, whereas Southern irregulars were excluded from the protections. In 1862, General-in-Chief of the Union forces Henry Halleck (1815–1872) ordered that captured irregulars were to be shot without trial. This order extended to civilians who helped the irregulars.³¹ Halleck also asked the legal scholar Francis Lieber (1800–1872) (→ Media Link #ai) to write a legal assessment of the status and treatment of guerrillas, which the latter produced in 1862. That Lieber wrote the memorandum on guerrillas³² before drafting the famous Lieber Code³³ in 1863 indicates the extent to which legal codification of the rules and customs of war was in fact influenced by the problems posed by irregular fighters. Lieber, a native German who had immigrated to Boston in 1827, had encountered the issue of irregular warfare during his time in Europe: he had joined the Prussian army during the era of Prussian military reform and briefly fought on the Greek side in the Greek War of Independence (1821–1830).

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In his 1862 memorandum, Lieber argued that the *levée en masse*, i.e. a militia force raised to defend against an invasion, was the only form of "irregular" fighters that could claim prisoners of war (POW) status. All other irregulars, such as brigands, partisans and free-corps, spies, rebels and conspirators should not enjoy POW protections and should be punished by death.³⁴ According to Lieber, their illegitimacy was based on the facts that, first, they did not fight on behalf of a proper authority, secondly, they were characterised by indiscipline and ignorance about the laws of war, thirdly, they posed a treacherous threat to the regular occupying army, and fourth, they undermined the protections for civilians.³⁵ The third and fourth aspects were obviously related to the fact that irregular fighters did not distinguish them-

selves from the civilian population. In short, for Lieber and many of his contemporaries, irregulars were the counter-image of the regular forces. Moreover, the harsh approach proposed by Lieber seems to have been implemented on the ground.³⁶

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Compared with the fate of irregular fighters, regular POWs on both sides were slightly better off, although the conditions in many POW camps were dreadful. The Confederate camp in Andersonville (→ Media Link #aj) was particularly notorious for its appalling conditions and high death rates, but the situation in Union camps was not substantially better. While in the South it was mainly a lack of resources that led to poor conditions, the North soon decided to retaliate by cutting rations for prisoners.³⁷ The creation of prisoner camps had become necessary after the exchange cartel had broken down repeatedly. These breakdowns of prisoner exchanges were frequently caused by the Confederacy, as they tried to retain Union officers in order to blackmail the Union into granting POW status to Southern irregulars.³⁸ The South also refused to recognise black Union troops and their white officers as POWs, which infuriated the North. Many black troops were massacred by the Confederate armed forces, most infamously during the Fort Pillow massacre on 12 April 1864 in Henning, Tennessee. The treatment of captured and detained regular armed forces during the American Civil War exhibited a trend that was to become a major feature of the issue of POWs during the 20th century: once prisoners were held in camps for longer periods, the conditions of their captivity tended to become a central element in the war propaganda of their home states.³⁹

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The Franco-Prussian War reaffirmed the move towards making prisoners' protections and privileges dependent on whether they were regular or irregular fighters, at least as far as political rhetoric was concerned. After the defeat of the French army at Sedan on 1 September 1870, the French government decided to continue the fight against the German invasion with whatever forces it had left, including all troops that did not formally belong to the regular French army plus the infamous *francs-tireurs* (literally "free shooters") (→ Media Link #ak). They were advised to wage a guerrilla campaign against the occupying German army by harassing the German forces and attacking their lines of communication rather than confronting them in open battle.⁴⁰ Although these irregular attacks did not inflict huge damage on the German forces and could not avoid France's eventual defeat, they forced the Germans to devote considerable resources to the protection of the rear areas.

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German rhetoric towards the French *francs-tireurs* was fierce: according to German Chancellor Otto von Bismarck (1815–1898) (→ Media Link #al), they were murderers rather than soldiers.⁴¹ They were to be shot or hanged if captured. The legal basis for this was a Prussian decree of 21 July 1866 according to which civilian snipers were to be executed.⁴² This approach was reiterated in an order issued on 22 August 1870 by the German high command.⁴³ After French criticism and insistence that the *francs-tireurs* were to be treated as legitimate combatants, Bismarck and General Albrecht von Roon (1803–1879) (→ Media Link #am) issued a decree on 27 August 1870 stipulating that *francs-tireurs* should be sentenced to a minimum of ten years of forced labour if captured.⁴⁴ However, it is not clear to what extent these rules and orders were followed by troops on the ground. Executions of *francs-tireurs* and reprisals against the inhabitants of nearby villages did occur.⁴⁵ Whether this policy was implemented in a systematic way remains unclear. It seems that *francs-tireurs* who were captured and not executed were usually treated in the same way as regular prisoners of war. There is no evidence that they were formally tried for war crimes and sentenced to forced labour, as the 27 August 1870 decree envisaged.⁴⁶ Yet the fierce German rhetoric did not fail to leave an impression on the French government, which by January 1871 succeeded in integrating the *francs-tireurs* into the French army.

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Both the American Civil War and the Franco-Prussian War resulted in legal reasoning and the drafting of the Lieber Code and the Brussels declaration. The Brussels declaration⁴⁷ was the outcome of a conference held in Brussels in 1874, which was intended to address the issues of occupation and the rights of resistance movements in occupied territory that had proven so difficult during the Franco-Prussian War.⁴⁸ In both the Lieber Code and the Brussels declaration the question of who is a legitimate belligerent and thus can claim the legal privileges of prisoner of war status were central to the emerging legal texts. In fact, the modern legal concept of "prisoner of war" only evolved in demarcation against the irregular fighter.⁴⁹ The Brussels conference did not achieve a legally binding document, just a declaration. This indicates that the issue of irregular fighters and their resistance to occupation was a politically highly divisive one: a law that was hard on resistance fighters would privilege great powers such as Germany and Russia and facilitate con-

quest. Lesser states such as Belgium and the Netherlands, supported by France and Britain, argued that they had to rely on militias and volunteer corps for the defence of their borders.⁵⁰

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Apart from this ideological conflict tied to a clash of national interests, the Lieber Code and the Brussels project partly also emerged from the necessity to create new rules, after wars in the 19th century had repeatedly shown that the old practices of exchange cartels, parole and impressment into the captor's armed forces had broken down for good. Long-term captivity of prisoners of war had to be regulated; questions of maintenance, treatment standards, labour and release had to be addressed. Both the Lieber Code (article 49) and the Brussels declaration (articles 23–34) attempted to create standards in these areas.

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More important for the further development of the modern law of armed conflict, however, was the explicit exclusion of irregular fighters (with the exception of militias and volunteer corps) from recognition as legitimate belligerents and thus as prisoners of war contained in the Lieber Code (articles 82–85) and the Brussels declaration (articles 9–11). The Brussels declaration laid the groundwork for what was to become the applicable law for the next century: legitimate belligerents were regular armies plus militias and volunteer corps, provided they fulfilled four criteria:

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1. That they have at their head a person responsible for his subordinates;
2. That they wear some settled distinctive badge recognizable at a distance
3. That they carry arms openly; and,
4. That, in their operations, they conform to the laws and customs of war.⁵¹

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These criteria were reiterated in the 1907 Hague Rules on the Laws and Customs of War on Land, thus becoming internationally binding law.⁵² Subsequent to the Hague Rules and the First World War (1914–1918), it seemed as if prisoners of war had developed into the lawmakers' most favoured war victims.⁵³ This was largely due to the experience of the First World War, during which prisoners, in particular British and French prisoners (→ Media Link #an) in German captivity, had suffered from harsh treatment that was in breach of the Hague Rules.⁵⁴ The fact that reports on the dire conditions under which British prisoners were detained in Germany had received large publicity in Britain during the war helped to keep the issue on the post-war political agenda. Accordingly, Britain had a large influence on the drafting of the 1929 Geneva Convention on prisoners.⁵⁵

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The 1929 Geneva Convention⁵⁶ reiterated many of the protections that had already been included in the Hague Rules and added some new ones, such as the prohibition of reprisals against POWs. It was an attempt at regulating the treatment of prisoners in more detail; specifically, it contained extended provisions on prisoner labour and aimed at strengthening supervision of the application of the legal rules. Yet many prisoners in the Second World War (1939–1945) faced a worse fate than during the First World War. However, this was not due to the weakness of the Convention. Rather, it was due to the unwillingness of certain states to apply the Convention unambiguously.⁵⁷ The Convention was generally followed on the western front, where prisoners were, by and large, treated well.⁵⁸ Here it was the mutual threat of retribution and the successful work of the guaranteeing powers that ensured the lawful treatment of POWs. The treatment of prisoners on the eastern front (→ Media Link #ao) and in the Pacific theatre was rather different. Two factors accounted for this: racial stereotypes (→ Media Link #ap) and military culture. The stereotypical ascription of "Asian cruelty" to Soviet soldiers tied in with certain features of military culture on both the German and the Russian sides: from the German perspective, surrender was seen as an irrational act of self-abandonment into the hands of an exceptionally cruel opponent, whereas Iosif Stalin (1879–1953) (→ Media Link #aq) branded surrender as a traitorous act of cowardice.⁵⁹ In the Pacific theatre, the characteristics of Japanese military culture led to widespread maltreatment of POWs. First, notwithstanding the fact that Japan had signed the 1929 Geneva Convention, it regarded it as an example of "the alien Western system of values which [it] hoped would disappear from Asia".⁶⁰ Secondly, imperial Japanese military culture was at odds with the idea of restraint in warfare in general and viewed surrender in particular as an unheroic and thus inconceivable act.

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In spite of the fact that legal codification of the POW regime had not been a wholesale success with respect to its efficiency on the battlefield, the enthusiasm about regulating the prisoner issue by international law was unbroken after the Second World War. The 1949 Geneva Convention III on prisoners is the most comprehensive of the four Geneva Conventions and adds further detail to the standards of their treatment. Yet while these repeated efforts aimed at enhancing the protections of POWs, they did not change the definition of their status: the requirements for recognition as legitimate belligerents and the four criteria remain literally unchanged. Hence, the exclusion of irregular fighters became a pivot of the codified law of armed conflict that remained unchallenged for a long time. The law was modelled on and promoted the template of the modern regular army, and even militias and voluntary corps had to resemble this template as closely as possible regarding their organisation, appearance and tactics. Thus, the legal codification of rules pertaining to prisoners and detainees was as much about ordering the battlefield as it was about providing protection for captured combatants.

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If anything changed regarding the treatment of irregular and thus unprivileged combatants with the codification of the law, it was the introduction of minimum standards for their treatment in order to prevent mass executions and atrocities. Lawmakers were aware of the fact that the exclusion of irregular fighters had frequently led to massacres and felt compelled to provide at least minimum standards of humane treatment. The Martens Clause included in the Hague Rules was initially intended to provide residual humanitarian protections for the civilian population in occupied territories, especially armed resisters among them.⁶¹ Common article 3 of the Geneva Convention fulfilled a similar function, and it also extended these minimal protections towards non-international armed conflicts.

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A real softening of the exclusionary mechanism along the regular-irregular cleavage line only occurred with the 1977 Additional Protocols. They emerged from the historical context of decolonisation. The status and the treatment of prisoners in colonial wars and wars of national liberation had been precarious for a long time, but only the shift of power towards the legitimacy of the cause of national liberation movements made the creation of the Additional Protocols possible.⁶² Colonial warfare had always been a curious case, because here the older, less specific mechanism of exclusion along cultural and ethnic lines that often regarded the native inhabitants as "uncivilised" coincided with the regular-irregular cleavage line. In fact, the two aspects often seemed to refer to each other in that native fighters were regarded as "uncivilised" because their military organisation and their way of fighting did not resemble those of regular armies.⁶³ Later, in the wars of decolonisation the question of the treatment of prisoners was often entangled with the perceived legitimacy of their cause. For instance, in the 1950s and 1960s in Algeria the French army preferred to label the conflict a "domestic affair" rather than a war.⁶⁴ This meant that the Geneva Conventions did not apply and that the Algerian fighters would not be treated as prisoners of war. It followed from the legal rules that officially granting the Algerian fighters POW status would have amounted to recognising them as legitimate belligerents. In this case, as in many other colonial wars and wars of decolonisation, political and strategic considerations kept the conflict outside the remit of the law of armed conflict. Instead, these conflicts tended to be regulated by ever more extensive and elastic emergency laws.

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Additional Protocol I and its lowering of the requirements for POW status were an attempt to bring at least some irregular fighters into the remit of the law. Article 43 dropped the four criteria listed in the Hague Rules and the Geneva Conventions and replaced them with the requirement that combatants have to carry their arms openly during each military engagement and while they prepare to launch an attack. This move acknowledges the fact that in wars of decolonisation, insurgents often cannot comply with the Geneva rules even if they wish to do so.⁶⁵ Their legitimacy, it seems, derives from the fact that their cause is, first, justified, and second, tends to put them into a situation that makes it difficult for them to resemble regular armed forces. It is important to keep in mind, however, that this line of thinking was not universally shared and that Additional Protocol I has not been universally ratified.

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Conclusion: Did the Prisoner of War Regime Originate in Europe?

It seems self-evident to conclude that the modern prisoner of war regime originated in Europe. After all, its legal codification took place in Europe and was extended to the non-European realm only after the process of decolonisation.⁶⁶

Moreover, there is some evidence that stricter and more advanced rules and constraints on the treatment of prisoners were applied in wars within Europe than in conflicts between Europeans and non-Europeans. The prohibition of the enslavement of fellow Christians in medieval warfare is a case in point. The stark difference between, on the one hand, the treatment of prisoners on the western front in the Second World War and on the eastern front and in the Pacific on the other hand suggests that after the prisoners regime had been legally codified, it was more effective within than outside of Europe, not least because Germany tended to regard its opponents on the western front as belonging to the European military tradition.

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However, we should be wary of such simplifications. While at the discursive level the construction of cultural or racial "otherness" between Europeans and their non-European counterparts often played a role in justifying massacres and the ruthless treatment of prisoners, combatants' behaviour on the ground was often not entirely consistent with such discourses. As mentioned above, the treatment of non-Christian prisoners during the crusades varied with the strategic and tactical circumstances of their capture. At the same time, the treatment of prisoners within Europe was often extremely harsh: in medieval warfare, the rules and constraints pertaining to prisoners only applied to the nobility, but did not protect peasants and town dwellers. Religious conflicts in early modern Europe were characterised by the frequent breakdown of all restraint. Moreover, some forms of warfare were, and continue to be, linked with particularly brutal treatment of prisoners, first and foremost siege warfare, both within and outside of Europe.

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Colonial warfare, both in terms of the initial conquest and the subsequent "policing" of the colonies, seems to stand out as the starkest illustration that European standards only applied in Europe, but not in Europe's encounters with the "uncivilised" world. But even in this case, the lines become blurred on closer inspection. This was mainly due to the impact of military culture on the behaviour of European armies, which were exposed to warfare both within Europe and in the colonies, and developed surprisingly persistent patterns of operational thinking and behaviour. There is striking continuity in the imperial German approach to prisoners: the Prussian army initially learnt lessons during the Franco-Prussian War, in particular with respect to dealing with irregular fighters. These lessons were subsequently "exported" to and "refined" in German Southwest Africa – a process that tragically led to the genocide of the Herero (→ Media Link #as).⁶⁷ German operational thinking was then "re-imported" into Europe, where it played no small role in German atrocities in Belgium in the opening months of the First World War.⁶⁸ Hence, imperial German behaviour towards prisoners, and in particular towards captured civilians suspected of partaking in an irregular campaign, tended to be as ruthless in Europe as it was in the colonies. This was a result of the German military culture, which promoted the annihilation of the opponent as the most important war aim and recognised the applicability of the laws of war only to the extent that the latter did not undermine the exigencies of military necessity.

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Moreover, the first step towards the legal codification of the modern prisoner of war regime, the Lieber Code, did not take place in Europe, but in America, and in the context of a distinctly "non-European" conflict, if "European" is here taken to mean a confrontation between two or more regular armies. The subsequent, more genuinely European, process of legal codification of the prisoner of war regime was precipitated by a sequence of wars that did not look particularly "European" in the aforementioned sense either: the Franco-Prussian War with its *francs-tireurs* issue and the two world wars, along with the trend towards the totalisation of the war effort. If anything, the legal codification of the prisoner regime was a European discourse about how and by whom war should be waged, a way of coping with the experience of wars that had shockingly deviated from that template, as it were, rather than being a reflection of European customs and practices in war.

▲ 33

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Appendix

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Notes

1. ^ Rüpke, *Kriegsgefangene* 1999, p. 83. I would like to thank the Leverhulme Trust and the Fell Fund for funding the research on which this article is based. I would also like to thank my colleagues from the Oxford Programme on the Changing Character of War and the participants of the 2007 Prisoners in War conference (including those who contributed chapters at a later stage) for discussion, comments and advice.
2. ^ Parts of this section are based on Scheipers, *Introduction* 2010, pp. 1–21.
3. ^ Ober, *Classical Greek Times* 1994, p. 13.
4. ^ Ducrey, *Kriegsgefangene* 1999, p. 78.
5. ^ Lonis, *La guerre en Grèce* 1985, pp. 366f.
6. ^ Rüpke, *Kriegsgefangene* 1999, p. 83.
7. ^ *ibidem*, pp. 91f.
8. ^ Overmans, *In der Hand des Feindes* 1999, p. 10.
9. ^ Stacey, *The Age of Chivalry* 1994, p. 30.
10. ^ *ibidem*, p. 38.
11. ^ Michael Howard subsumes siege warfare under *guerre mortelle*; Howard, *War in European History* 1976, p. 6. In contrast, Robert Stacey explains that from a legal point of view siege warfare was a "special case", following the rules of neither *bellum hostile* nor *guerre mortelle*: "Strictly speaking, ... [a] siege was not an act of war but the enforcement of a judicial sentence against traitors who had disobeyed their prince's lawful command." Stacey, *The Age of Chivalry* 1994, p. 38.
12. ^ Mégret, *A Cautionary Tale* 2010, pp. 23–37.
13. ^ Glover, *The Velvet Glove* 1982, p. 159.
14. ^ Parker, *Success is Never Final* 2002.
15. ^ Wilson, *Prisoners in Early Modern European Warfare* 2010, pp. 39–56.
16. ^ Parker, *Success is Never Final* 2002, p. 154.
17. ^ *ibidem*, p. 161.
18. ^ Hohrath, *In Cartellen* 1999, p. 165.
19. ^ Abell, *Prisoners of War* 1914, p. 284.
20. ^ Note that the *levée* in revolutionary France had been preceded, and in parts even inspired, by the emergence of the American militia during the American War of Independence. Murphy, *The American Revolutionary Army* 1959, pp. 13–20.
21. ^ Pelzer, *Il ne sera fait aucun prisonnier anglais ou hanovrien* 1999, p. 204.
22. ^ Daly, *Napoleon's Lost Legions* 2004, p. 371.
23. ^ Pelzer, *Il ne sera fait aucun prisonnier anglais ou hanovrien* 1999, p. 204.
24. ^ Woolf, *Napoleon's Integration* 1991, pp. 162–164.
25. ^ For a more detailed discussion of this process, see Scheipers, *The Status* 2011.
26. ^ According to Thomas Hippler, this was mainly due to the perceived need to "discipline" the "people in arms" in order to guard against the implicit danger of the democratisation of warfare, namely, that the people could rise against the state. Hippler, *Citizens* 2007, p. 63. On the professionalisation of the Napoleonic army; see Broers, *Europe under Napoleon* 1996, p. 12.
27. ^ Forrest, *The Ubiquitous Brigand* 2005, p. 37.
28. ^ The roots of this discourse can be traced back to legal reasoning in early modern Europe, notably by Baltasar Ayala, Christian Wolff and Emmerich de Vattel, who denounced "rebels", "brigands" and "banditti" as unjust belligerents. Parker, *Success is Never Final* 2002, p. 141. Vattel, *The Law of Nations* 1982 [first edition 1758 <http://oll.libertyfund.org/title/1858>], p. 482; Edelstein, *War and Terror* 2008, p. 229. However, the discourse gained a new quality with the introduction of "discipline" as the main – if only theoretical – distinguishing feature between the regular and the irregular after the emergence of conscript armies.
29. ^ In fact, the Union never explicitly recognised Confederate belligerency. However, the Supreme Court ruled in 1863 in the Prize Cases that the conflict between the Union and the Confederacy was a war. Neff, *War and the Law*

- 2005, p. 259.
30. ^ Mitchell, *Our prison system* 1997, p. 567.
 31. ^ Fellman, *At the Nihilist Edge* 1997, p. 524.
 32. ^ Lieber, *Guerrilla Parties* pp. 275–292.
 33. ^ General Orders No. 100: The Lieber Code: Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber, online: http://avalon.law.yale.edu/19th_century/lieber.asp [28/04/2011].
 34. ^ Lieber, *Guerilla Parties* 1862, pp. 10ff.
 35. ^ *ibidem*.
 36. ^ Fellman, *At the Nihilist Edge* 1997, pp. 524ff.
 37. ^ Mitchell, *Our Prison System* 1997, pp. 566f.
 38. ^ *ibidem*, p. 574.
 39. ^ *ibidem*, p. 566.
 40. ^ Howard, *The Franco-Prussian War* 1981, p. 249.
 41. ^ *ibidem*, p. 251.
 42. ^ Hull, *Absolute Destruction* 2005, p. 118. The German legal discourse recurred solely to European legal sources; the developments in America were not taken into account.
 43. ^ Mitze, *Seit der babylonischen Gefangenschaft* 1999, p. 238.
 44. ^ *ibidem*, p. 239.
 45. ^ See, for instance, Stoneman, *The Bavarian Army* 2001, pp. 271–293.
 46. ^ Mitze, *Seit der babylonischen Gefangenschaft* 1999, p. 588.
 47. ^ Project of an International Declaration concerning the Laws and Customs of War. Brussels, 27 August 1874, online: International Committee of the Red Cross (ICRC), *International Humanitarian Law – Treaties & Documents*, <http://www.icrc.org/ihl.nsf/INTRO/135?OpenDocument> [28/04/2011].
 48. ^ Nabulsi, *Traditions of War* 1999, pp. 5f.
 49. ^ Oeter, *Die Entwicklung* 1999, p. 48.
 50. ^ Nabulsi, *Traditions of War* 1999, p. 6.
 51. ^ Project of an international declaration concerning the laws and customs of war, 27 August 1874, 1 (Supp.), in: *American Journal of International Law* 96 (1907), pp. 97–98.
 52. ^ 1907 Hague Convention IV respecting the laws and customs of war on land, annex to the convention: Regulations respecting the laws and customs of war on land, article 1, online: http://avalon.law.yale.edu/20th_century/hague04.asp#iart1 [28/04/2011].
 53. ^ Best, *War and Law* 1994, p. 135.
 54. ^ Kramer, *Prisoners in the First World War* 2010, pp. 77ff.
 55. ^ Wylie, *Barbed Wire Diplomacy* 2010, pp. 42ff.
 56. ^ Convention relative to the Treatment of Prisoners of War. Geneva, 27 July 1929, online: International Committee of the Red Cross (ICRC), *International Humanitarian Law – Treaties & Documents*: <http://www.icrc.org/ihl.nsf/INTRO/305?OpenDocument> [28/04/2011].
 57. ^ Wylie, *The 1929 Prisoner* 2010, p. 103.
 58. ^ Moore, *The Treatment of Prisoners* 2010, pp. 111–126.
 59. ^ Overmans, *The Treatment of Prisoners* 2010, pp. 127–140.
 60. ^ Towle, *Japanese Culture* 2010, pp. 141–155.
 61. ^ Merom, *The Martens Clause* 2000, p. 79.
 62. ^ Best, *War and Law* 1994, pp. 343ff.
 63. ^ Gong, *The Standard* 1984, pp. 15ff.
 64. ^ Branche, *The French in Algeria* 2010, pp. 173–186.
 65. ^ Best, *War and Law* 1994, p. 334.
 66. ^ This is not to say that non-European legal traditions regarding the treatment of prisoners in war do not exist. Most notably, a detailed prisoners regime had developed in the Islamic tradition. See Kelsay, *Arguing the Just War* 2007; Abou El Fadl, *Rebellion and Violence* 2001.
 67. ^ Hull, *Absolute Destruction* 2005.
 68. ^ Horne / Kramer, *German Atrocities* 2001.

DDC: 341 [Info ] , 342 [Info ] , 355 [Info ]

Citation

Scheipers, Sibylle: Prisoners and Detainees in War, in: European History Online (EGO), published by the Institute of European History (IEG), Mainz 2011-11-15. URL: <http://www.ieg-ego.eu/scheipers-2011-en> URN: urn:nbn:de:0159-2011050916 [YYYY-MM-DD].

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